Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

78-1125

NO. A-421

The Honorable JOE J. FISHER,
United States District Judge,
Petitioner

v.

Cooper Tire & Rubber Company,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

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SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	3
Reasons the Writ Should Be Granted	6
I. IMPORTANCE OF THE QUESTIONS PRESENTED	
A. IN RECOGNITION OF ITS OBLIGATION TO SUPERVISE THE LOWER FEDERAL COURTS, THE COURT OUGHT TO DECIDE ON THE PROPRIETY OF MANDAMUS AS A REMEDY IN THE DISPOSITION OF §1404(a) MOTIONS	6
B. THE ISSUANCE OF A WRIT OF MANDAMUS UPON A FAILURE TO TRANSFER IS INCONSISTENT WITH THE JURISDICTION CONFERRED ON THE COURT OF APPEALS BY CONGRESS IN THE ALL WRITS ACT	7
II. CONFLICT OF DECISIONS	
A. AN ISSUANCE OF MANDAMUS WITHOUT GIVING THE PARTY TO WHOM THE WRIT IS ADDRESSED AN OPPORTUNITY TO RESPOND IS AN ARBITRARY EXERCISE OF JUDICIAL POWER	9
B. BY GRANTING MANDAMUS IN THIS CASE, THE FIFTH CIRCUIT HAS ADOPTED A LIBERAL STANDARD FOR THE ISSUANCE OF EXTRAORDINARY WRITS, ONE THAT CONFLICTS WITH DECISIONS IN THE OTHER CIRCUITS	9
Conclusion	13
Certificate of Service	14

LIST OF AUTHORITIES

CASES — Page

All States Freight, Incorporated v. Modrelli, 196 F.2d 1010 (3d Cir. 1952) 10

Chicago R.I. & P.R.R. v. Hugh Breeding, Incorporated, 247 F.2d 217 (10th Cir. 1957), *cert. denied* 355 U.S. 880 . . . 8

Clayton v. Warlick, 232 F.2d 699 (4th Cir. 1956) 10, 13

Codex Corporation v. Milgo Electronic Corporation, 555 F.2d 735, 737 (1st Cir. 1977) 10

Ellicott Machine Corporation v. Modern Welding Company, 502 F.2d 178, 181 (4th Cir. 1974) 11

Great Northern Railway Co. v. Hyde, 238 F.2d 852 (8th Cir. 1956) 10

In Re Josephson, 218, F. 2d 174, 181 (1st Cir. 1954) 8,10,12

Kasey v. Molybdenum Corporation of America, 408 F.2d 16, 19-20 (9th Cir. 1969) 12

Lemon v. Druffel, 253 F.2d 680, 685 (6th Cir. 1958) 11

Lora Company v. Alsop, 565 F.2d 998, 1000, (8th Cir. 1977) . 12

McGraw-Edison Company v. Van Pelt, 350 F.2d 361 (8th Cir. 1965) 12

Norwood v. Kirkpatrick, 349 U.S. 29 (1955) 6

A. Olinick & Sons v. Dempster Brothers, Inc. 365 F.2d 439, 445 (2d Cir. 1966) 11, 12

Soloman v. Continental American Life Insurance, 472 F.2d 1043 (3rd Cir. 1973) 11

Starnes v. McGuire, 512 F.2d 918, 929 (D.C. Cir. 1974) 11

Sypert v. Miner, 266 F.2d 196, 199 (7th Cir. 1953) 12

Texas Gulf Sulphur Co. v. Ritter, 371 F.2d 145, 146-147 (10th Cir. 1967) 12

Van Dusen v. Barrack, 376 U.S. 612, 615 fn.3 (1964) 7

Will v. United States, 389 U.S. 90, 107 (1967) 9

STATUTES — Page

28 U.S.C. §1404(a) 2,3,4,5, 6,7,10

28 U.S.C. §1651(a) 3,7,10

RULES

Rule 21(b), Federal Rules of Appellate Procedure 5

Rule 40, Federal Rules of Appellate Procedure 5

OTHER SOURCES

15 Wright, Federal Practice and Procedure §3855 1976 7

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The Honorable JOE J. FISHER,
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v.

Cooper Tire & Rubber Company,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

The Honorable Joe J. Fisher, United States District Judge for the Eastern District of Texas, respectfully requests that a writ of certiorari issue to review the issuance of a writ of mandamus by the United States Court of Appeals for the Fifth Circuit ordering him to transfer a cause of action from his district to the Northern District of Texas, Lubbock Division.

OPINIONS BELOW

All opinions and orders regarding the motion to transfer, denial of mandamus, renewed motion to transfer, subsequent denial of mandamus, and the granting of mandamus on rehearing are unreported. The orders and opinions of the Petitioner, as well as the orders and opinions of the Fifth Circuit are appended hereto.

JURISDICTION

A final order issuing a writ of mandamus was entered on Respondent's motion for rehearing by the Court of Appeals for the Fifth Circuit on August 31, 1978. Petitioner moved for an extension of time in which to file his petition for certiorari on October 30, 1978. The Honorable Justice Lewis F. Powell, Jr. granted Petitioner's request on November 6, 1978, and extended time for filing this petition up to and including January 13, 1979. The statutory provision which confers jurisdiction on this Court is 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is mandamus an appropriate remedy for errors in discretion in granting/denying 28 U.S.C. §1404(a) motions for transfer?

2. Assuming mandamus is proper under certain circumstances, can it ever be validly issued when a judge denies a §1404(a) motion?

3. Is the issuance of mandamus without giving the party to whom it is addressed an opportunity to respond an arbitrary exercise of discretion?

4. Has the Fifth Circuit adopted a liberal standard for issuing the extraordinary writ of mandamus, one that conflicts with its sister circuits?

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1404(a): "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer all civil action to any other district or division where it might have been brought."

28 U.S.C. §1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

The procedural posture of this case requires illumination; in reaching this Court, it has not travelled the customary path of a writ of mandamus issued to a United States District Judge. The Respondent began this "trial on venue" on August 22, 1977, when it filed its original motion to transfer a cause of action styled *Davidson, et al v. Cooper Tire and Rubber Company* from the Eastern District of Texas, Marshall Division, to the Northern District of Texas, Lubbock Division.

After briefs were submitted by both parties but without a hearing on the merits of the transfer request, the Petitioner denied the motion to transfer made under the terms of 28 U.S.C. §1404(a) on November 29, 1977. The corporate Defendant then petitioned the Court of Appeals for the Fifth Circuit for a writ of mandamus directing transfer on December 23, 1977.

The Fifth Circuit declined to issue a writ of mandamus on that petition, but did order an answer filed on behalf of Judge Fisher. On February 16, 1978, the Fifth Circuit found that Judge Fisher's order of November 29, 1977 had been entered prematurely. The Court counseled the Respondent to renew the motion to transfer, and further counseled that a hearing should be held on the merits of any renewed motion to transfer.

The Respondent followed the advice of the Fifth Circuit; a renewed motion was filed on March 29, 1978. Plaintiffs responded after affidavits and additional briefing. In accordance with the Fifth Circuit's admonition, a hearing was held on the §1404(a) motion to transfer on April 4, 1978 in Marshall, Texas. The hearing was presided over by the Petitioner, and each of the named Plaintiffs was present.

After taking the merits of the transfer request under advisement, Petitioner denied the renewed motion to transfer on April 14, 1978. Judge Fisher considered the statutory criteria of convenience of the parties and witnesses as well as the interests of justice in denying the second transfer request. The order reflects consideration of the following factors:

1. The Plaintiffs' choice of forum — the Eastern District of Texas, Marshall, Division.
2. The comparative docket conditions between the Marshall court and Lubbock court.
3. The fact that Marshall, Texas was readily accessible to all the witnesses and more accessible to several of the witnesses than was Lubbock, Texas.
4. The lack of any demonstrable inconvenience to the corporate Defendant by trial in Marshall, Texas.

It is apparent from the order itself that the Petitioner relied on the mandate of §1404(a) in exercising the discretion given him by Congress in denying the motion to transfer.

Believing the Petitioner had erred, Respondent attempted to secure certification under 28 U.S.C. §1292(b) of the transfer question in order to obtain appellate review. Judge Fisher refused to amend his order of April 14, 1978 to allow such review. Thereafter, Respondent filed another petition for a writ of mandamus in the Court of Appeals for the Fifth Circuit.

Without ordering answer by the Petitioner in accordance with Rule 21(b), Federal Rules Appellate Procedure, the Fifth Circuit denied the petition for a writ of mandamus in a one-sentence order dated and filed June 5, 1978.

On June 19, 1978, the Respondent filed a petition for rehearing. An answer, having failed to be requested by the Fifth Circuit pursuant to Rule 40(a), Federal Rules Appellate Procedure, was not filed on behalf of Petitioner. Therefore, contrary to his reliance on the propriety of his action as evidenced by the Fifth Circuit's failure to require response, the Petitioner was astounded when a writ of mandamus was issued on rehearing by a divided panel. The per curium majority opinion was filed on August 31, 1978. The Petitioner was commanded to transfer the cause of action to the Northern District of Texas, Lubbock Division, without ever having been given the opportunity to respond to charges that he had abused his discretion in the exercise of the judicial function.

REASONS THE WRIT SHOULD BE GRANTED

I.

IMPORTANCE OF THE QUESTIONS PRESENTED

A. In Recognition Of Its Obligation To Supervise The Lower Federal Courts, The Court Ought To Decide On The Propriety Of Mandamus As A Remedy In The Disposition of §1404(a) Motions.

While the Courts of Appeals have concurred that mandamus may be an appropriate remedy under certain circumstances in a ruling on a motion to transfer to a more convenient forum, this Court has never authorized the use of mandamus. The Court has twice acknowledged the fact that it has not approved mandamus as a remedy for a grant or denial of a §1404(a) motion to transfer. The first opportunity to rule on the appropriateness of a writ of mandamus as a remedy in this situation came in *Norwood v. Kirkpatrick,* 349 U.S. 29 (1955). There the Court noted:

> Since we find that the district judge properly construed §1404(a), it is unnecessary to pass upon the question of whether mandamus or prohibition is the proper remedy.

Norwood, at 33.

The Court again declined to rule on the question, but noted its reluctance to decide the question in a footnote:

> Although it is clear that this Court has jurisdiction to review the judgment of the Court of Appeals, the Government, a defendant in this case, urges that the judgment below be reversed because mandamus was an improper remedy . . . Since in our opinion the courts below

> erred in interpreting the legal limitations upon and criteria for a §1404(a) transfer, we find it unnecessary to consider the mandamus contentions advanced by the government.

Van Dusen v. Barrack, 376 U.S. 612, 615 fn.3 (1964). A leading commentator has urged that the Court resolve the question on whether mandamus is available to a disappointed litigant as a remedy for an adverse ruling on a §1404(a) motion to transfer.[1] The Court should indeed invoke its sweeping power over the operation of the federal courts in the federal system as recognized in the Court's own Rule 19 and grant certiorari to resolve this important federal question.

B. The Issuance Of A Writ Of Mandamus Upon A Failure To Transfer Is Inconsistent With The Jurisdiction Conferred On The Courts of Appeals By Congress In The All Writs Act.

Assuming *arguendo,* that mandamus is appropriate when a District Judge grants a §1404(a) motion to transfer, that does not settle the question as to whether mandamus is available on a refusal to transfer. The All Writs Act states that the federal courts may:

> issue all writs necessary or appropriate in aid of their respective jurisdictions.

28 U.S.C. §1651(a).

If mandamus is to be issued only upon aid of jurisdiction, its issuance in a refusal to transfer is improper:

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1. 15 Wright, *Federal Practice and Procedure* §3855 (1976).

> If the district judge had held on to the case, i.e., had denied the motion to transfer such action would have preserved, not frustrated any potential appellate jurisdiction which we might have had; and we are at a loss to understand how we could properly review on mandamus an order denying transfer, on the pretense that such a review would be in 'aid' of our appellate jurisdiction.

In Re Josephson, 218 F. 2d 174, 181 (1st Cir. 1954).

Simply stated, in cases in which a District Judge transfers a cause out of his appellate circuit, a Court of Appeals might justifiably grant a writ of mandamus since the issuance of such a writ would be in aid of jurisdiction for without such a writ the Court of Appeals would never have jurisdiction over the transfer question. Transfer questions are available for review on appeal,[2] and to allow mandamus on an issue which is capable of review on appeal conflicts with the long-standing federal policy against piecemeal appeals.

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2. *Chicago R.I. & P.R.R. v. Hugh Breeding, Incorporated,* 247 F.2d 217 (10th Cir. 1957), *cert. denied,* 355 U.S. 880.

II.

CONFLICT OF DECISIONS

A. An Issuance Of Mandamus Without Giving The Party To Whom The Writ Is Addressed An Opportunity To Respond Is An Arbitrary Exercise Of Judicial Power.

In a case in which the Seventh Circuit granted a writ of mandamus without findings of fact or an opinion, this Court wrote:

> Mandamus is not a punitive remedy. A mandamus from the blue without rationale is tantamount to an abdication of the very expository and supervisory functions of an appellate court upon wich the Government rests its attempt to justify the action below.

Will v. United States, 389 U.S. 90, 107 (1967).

The absence of a statement of the Seventh Circuit's legal reasoning was a sufficient ground for the reversal of the order granting the writ. Surely the same rationale must be followed in this case. The Fifth Circuit could not have reached a reasoned decision without considering both sides of the question. In the peculiar posture of this case, the issuance of the writ was truly a shot from the blue; and, the Fifth Circuit's order should not be allowed to stand against the holding in *Will, supra.*

B. By Granting Mandamus In This Case, The Fifth Circuit Has Adopted A Liberal Standard For The Issuance of Extraordinary Writs, One That Conflicts With Decisions In The Other Circuits.

The initial position taken by the majority of the courts in considering the availability of mandamus in §1404(a) petitions was restrictive. Mandamus was not available to review a court's exercise of discretion in the grant or denial of a §1404(a) motion to transfer. The extraordinary writ was only available when the power of a District Court to make an order was at issue or a question of law was raised.[3]

The appellate courts have recently retreated from that sound position. The majority of the circuits now indulge in some form of discretionary mandamus, but none to the extent now allowed by the Fifth Circuit. The First Circuit stands alone in adhering to the former view; its leading decision states:

> Contrary to the view which seems to have been occasionally taken, or at least *sub silentio* assumed, in other courts of appeals, we do not think that 28 U.S.C. §1651 grants us a general roving commission to supervise the administration of justice in the federal district courts within our circuit, and in particular to review by writ of mandamus any unappealable order which we believe should be immediately reviewable in the interests of justice.

In Re Josephson, supra at 177.

The First Circuit's continued allegiance to that view was recently demonstrated in *Codex Corporation v. Milgo Electronic Corporation,* 555 F.2d 735, 737 (1st Cir. 1977).

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3. *All States Freight, Incorporated v. Modrelli,* 196 F.2d 1010 (3d Cir. 1952); *Clayton v. Warlick,* 232 F.2d 699 (4th Cir. 1956); *Great Northern Railway Co. v. Hyde,* 238 F.2d 852 (8th Cir. 1956).

A summary analysis of the remaining circuits fails to show any court embracing as liberal a standard for issuance of the extraordinary writ as the Fifth Circuit's:

(1) *District of Columbia Circuit* — considers mandamus "an extraordinary remedy, and is to be used only where essential in the interest of justice." *Starnes v. McGuire,* 512 F.2d 918, 929 (D.C. Cir. 1974).

(2) *Second Circuit* — More than a difference of opinion in the proper disposition of §1404(a) motion is required; mandamus will only issue to correct "a clear-cut abuse of discretion." *A. Olinick & Sons v. Dempster Brothers, Inc.,* 365 F.2d 439, 445 (2d Cir. 1966). It should be also noted that as of this writing no writs have issued in satisfaction of that standard.

(3) *Third Circuit* — The court's most recent pronouncement allows mandamus "only where the trial court exceeded its authority or acted outside its jurisdiction." *Soloman v. Continental American Life Insurance,* 472 F.2d 1043 (3d Cir. 1973).

(4) *Fourth Circuit* — allows discretionary mandamus, but has recently questioned the wisdom of such review. *Ellicott Machine Corporation v. Modern Welding Company,* 502 F.2d 178, 181 (4th Cir. 1974).

(5) *Sixth Circuit* — requires an "exceptional case where there was a clear abuse of discretion or ursurpation of judicial power." *Lemon v. Druffel,* 253 F.2d 680, 685 (6th Cir. 1958).

(6) *Seventh Circuit* — adheres to a moderate view, requiring "a strong case of abuse of discretion." *Sypert v. Miner,* 266 F.2d 196, 199 (7th Cir. 1953).

(7) *Eighth Circuit* — The leading case announces that an "appellate court may not substitute [its] own discretion for that of the district court." *McGraw-Edison Company v. Van Pelt,* 350 F2d 361 (8th Cir. 1965).[4]

(8) *Ninth Circuit* — does not allow "full scale appeal" on mandamus nor will the Court "substitute its judgment for that of the judge most familiar with the problem." *Kasey v. Molybdenum Corporation of America,* 408 F.2d 16, 19-20 (9th Cir. 1969).

(9) *Tenth Circuit* — Its position is less solidified. This court has had only one opportunity to consider discretionary mandamus, *Texas Gulf Sulphur Co. v. Ritter,* 371 F.2d 145, 146-147 (10th Cir. 1967), wherein it announced the "clear showing of abuse of discretion" standard.

This rough survey of the circuits should reveal the variances among their respective standards. Reviewing those standards, it should be obvious that the Fifth Circuit has adopted the most liberal view among the circuits. In this case, the court became "a roving commission" which "substituted its judgment for that of the trial judge" without requiring that petitioner show "a clearcut abuse of discretion." *Josephson, supra; McGraw-Edison, supra; Kasey, supra; Olinick & Sons, supra.* Certiorari should

4. Recently reaffirmed in *Lora Company v. Alsop,* 565 F.2d 998, 1000 (8th Cir. 1977).

issue to resolve these apparant conflicts between the circuits and correct what has been termed a "hopeless conflict." *Clayton, supra.*

CONCLUSION

Certiorari should issue when (1) important federal questions are unsettled; (2) a conflict exists between the Court of Appeals' decision and previous decisions of the Supreme Court; (3) a conflict on a point of law exists between the circuits. This Petition presents the Court with all three situations. For the reasons advanced, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Fifth Circuit granting a writ of mandamus.

Respectfully submitted,

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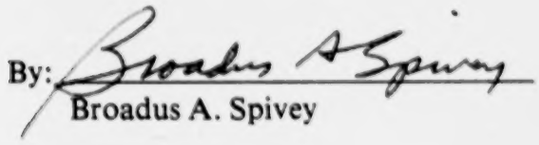
By: 
Broadus A. Spivey

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has been mailed to the following attorneys of record on this the 16th day of January, 1979; Mr. Bernard P. Evans, Attorney at Law, P.O. Box 2585, Lubbock, Texas 79408, and Mr. Rex Nichols, Attorney at Law, P.O. Box 2623, Longview, Texas 75601.

APPENDIX

Order Denying Transfer (November 29, 1977), Joe J. Fisher, United States District Judge A-1

Order Directing Response (January 3, 1978); Thornberry, Roney and Hill, Circuit Judges, Court of Appeals for the Fifth Circuit B-1

Order Granting Substitution (January 17, 1978), Roney and Hill, Circuit Judges, Court of Appeals for the Fifth Circuit C-1

Order Denying Petition for Writ of Mandamus (February 16, 1978), Thornberry, Roney and Hill, Circuit Judges, Court of Appeals for the Fifth Circuit..... D-1

Order Overruling Defendant's Motion to Transfer (April 14, 1978), Joe J. Fisher, United States District Judge..... E-1

Judgment Denying Defendant's Motion for an Amended Order (May 2, 1978), Joe J. Fisher, United States District Judge..... F-1

Order Denying Petition for Writ of Mandamus (June 5, 1978), Brown, Chief Judge, Coleman and Vance, Circuit Judges, Court of Appeals for the Fifth Circuit..... G-1

Order on Rehearing Granting Petition for Writ of Mandamus, (August 31, 1978), Brown, Chief Judge, Coleman and Vance, Circuit Judges, Court of Appeals for the Fifth Circuit H-1

In The
UNITED STATES DISTRICT COURT
for the Eastern District of Texas
Marshall Division

CIVIL NO. M-77-72-CA

CYNTHIA ALLEN DAVIDSON, ET AL

vs.

COOPER TIRE AND RUBBER COMPANY

ORDER

On this date came on for consideration Defendant's Motion to Transfer in the above entitled and numbered cause and the Court being of the opinion that same should be overruled, it is therefore the ORDER of this Court that Defendant's Motion to Transfer be DENIED.

DONE AND ENTERED this the 29th day of November, 1977.

/s/ JOE J. FISHER
Joe J. Fisher
United States District Judge

In The
UNITED STATES COURT OF APPEALS
for the Fifth Circuit

NO. 77-3496

In Re:

COOPER TIRE & RUBBER COMPANY

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas.

Before THORNBERRY, RONEY and HILL, Circuit Judges.

BY THE COURT:

After initial consideration of Cooper Tire & Rubber Company's petition for writ of mandamus, the Court orders that respondents-plaintiffs Cynthia Allen Davidson, et al., file a response to said petition with this Court within 14 days of the date of this order. *See* Rule 21, Fed. R. App. P., Local Rule 22, Fifth Circuit.

SO ORDERED.

In The
UNITED STATES COURT OF APPEALS
for the Fifth Circuit

NO. 77-3496

In Re:

COOPER TIRE & RUBBER COMPANY

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas

Before RONEY and HILL, Circuit Judges.

BY THE COURT:

IT IS ORDERED that petitioner's application for substitution of Honorable Joe J. Fisher as respondent is GRANTED.

In The
UNITED STATES COURT OF APPEALS
for the Fifth Circuit

NO. 77-3496

In Re:

COOPER TIRE & RUBBER COMPANY

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas.

Before THORNBERRY, RONEY and HILL, Circuit Judges.

BY THE COURT:

Cooper Tire & Rubber Company, petitioner here, is the named defendant in an action brought by Cynthia Allen Davidson, Ricky Davidson, and Dorman Allen in the United States District Court for the Eastern District of Texas, Marshall District. Petitioner moved, in that district court, for a transfer of the case from the Eastern District of Texas to the Northern District of Texas, Lubbock Division, under the provisions of 28 U.S.C. §1404 (a). The district judge presiding, Honorable Joe J. Fisher, denied the motion for transfer and petitioner seeks in this Court the issuance of a writ of mandamus directed to the district judge compelling the granting of the transfer.

From the record before us it appears that, shortly after the commencement of the case in the district court and before any discovery or other development of facts had taken place, the defendent filed its motion *alleging* facts which, if shown to be correct and if shown to have been all of the pertinent facts, would make a compelling case for a transfer to the Northern District of Texas. Plaintiffs responded merely by the filing of a brief in opposition to the motion. No additional facts were asserted by the plaintiff.

Thereafter, without the filing of any affidavits, depositions, answers to interrogatories, responses to requests for admissions, or the taking of testimony, the trial judge denied petitioner's motion. Whereupon, this application to our court for writ of mandamus was instituted.

After reviewing the matter, we requested and obtained a response to the motion filed on behalf of the plaintiffs in the district court. Here, for the first time, the plaintiffs, opposing the application for writ of mandamus, asserted some additional facts which they say supports venue in plaintiffs' chosen forum and militates against the grant of a transfer.

It thus appears that either the denial or grant of a transfer under 28 U.S.C. §1404 (a) by the district court on the date of its order, November 29, 1977, was premature. The trial judge had before him only the allegations of the defendant moving for the transfer and a law brief in opposition. No facts touching upon the factors to be considered under 28 U.S.C. §1404 (a) were found by the district court. Indeed, there existed no evidentiary basis for findings of

fact. It now appears that the plaintiffs in the district court, intervening here, seek to establish facts in addition to those alleged by the defendant in its verified motion. Those additionai facts have not yet ever been *alleged* in the district court.

This court will not undertake, initially, the conducting of hearings or consideration of other evidence in order to make the fact determination. Such is appropriate to the trial court.

We are considering an application for the writ of mandamus, not an interlocutory appeal. Therefore, our order does not go to the propriety of the entry of the district court's order denying transfer. We are to order the district judge to grant the transfer or decline to issue such an order. Inasmuch as, when the facts have been made to appear to the trial court, petitioner Cooper Tire & Rubber Company may renew its motion for transfer under 28 U.S C. §1404 (a), *Sypert v. Miner,* 266 F 2d 196 (7th Cir.) *cert. denied,* 361 U.S. 832 (1959); *United States Lines Company v. MacMahon,* 285 F. 2d 212 (2nd Cir. 1960), no prejudice exists on account of the premature order on the motion as originally filed.

For the reasons stated, petitioner's application for the writ of mandamus is DENIED.

E-1

In The
UNITED STATES DISTRICT COURT
for the Eastern District of Texas
Marshall Division

CIVIL NO. M-77-72-CA

CYNTHIA ALLEN DAVIDSON, ET AL

vs.

COOPER TIRE AND RUBBER COMPANY

ORDER OVERRULING
DEFENDANT'S MOTION TO TRANSFER

On this 4th day of April, 1978, came on to be considered the Motion to Transfer filed herein by the Defendant and the Court having considered all pleadings on file in the above cause and all affidavits filed herein in connection with the Motion to Transfer and Reply thereto, and after having considered evidence and argument of counsel, does hereby make the following findings and orders.

The Court finds that the Defendant is engaged in doing business in the Marshall Division of the United States District Court for the Eastern District of Texas and the Court therefore has proper venue in this cause and the only question remaining to be determined is the matter of forum non conveniens.

It is the opinion of the Court and the Court so finds that the Plaintiff's choice of forum is the Marshall Divi-

sion of the United States District Court for the Eastern District of Texas and that such choice of forum by the Plaintiffs should be accorded great weight and should not be overruled absent clear and strong evidence. *Akers v. Norfolk & Western Ry. Co.*, (1967, CA4 Va.), 378 F. 2d 78; *Gulf v. Gilbert*, 330 U.S. 501 (1947).

The Court further finds that the litigation will in all likelihood reach a trial in the Marshall Division of the United States District Court for the Eastern District of Texas at an earlier date than if it is transferred to the Lubbock Division of the Northern District of Texas and in fact a transfer of the cause will effectuate a delay in the trial of this cause. The Court makes this finding after considering the relative facts in connection with the congestion of the Marshall Division docket as compared to the docket of the Lubbock Division of the United States District Court for the Northern District of Texas.

The Court is of the opinion and finds that the Plaintiffs do have material witnesses who will give testimony of a substantial nature in the trial of this cause who reside in Marshall, Harrison County, Texas. Further the Court finds that the Plaintiffs, as well as the Defendant, expect to call to testify certain expert witnesses who will testify to matters of a substantial nature and that Marshall is equally available to such experts and the parties as Lubbock.

The Court finds after consideration of the evidence adduced and the affidavits on file that the Defendant will not be unduly inconvenienced if this cause of action

is tried in Marshall, Texas, and that all parties will best be served if said cause is tried in Marshall, Harrison County, Texas.

The Court further finds that the convenience of the parties, the convenience of the witnesses, and the interest of justice dictate that Defendant's Motion for Transfer for Forum Non Conveniens be and hereby is in all things OVERRULED. *Ex Parte Gulf, Colorado & Santa Fe Ry. Co.*, 308 F 2d 803 (1962); and *Ex Parte John F. Blaski*, 245 F. 2d 737.

DONE and ENTERED this the 14th day of April, 1978.

/s/ JOE J. FISHER
Joe J. Fisher
United States District Judge

F-1

In The
UNITED STATES DISTRICT COURT
for the Eastern Division of Texas
Marshall Division

CIVIL NO. M-77-72-CA

CYNTHIA ALLEN DAVIDSON, ET AL

vs.

COOPER TIRE AND RUBBER COMPANY

JUDGEMENT DENYING DEFENDANT'S
MOTION FOR AMENDED ORDER

On April 4, 1978, Defendant's Renewed Motion to Transfer pursuant to 28 U.S.C., Section 1404 (a) in the above entitled and numbered cause of action came before this Court for consideration, and this Court being of the opinion that the same should be overruled, entered an Order Denying Transfer.

On this date came on for consideration Defendant's Motion to Amend the Order Denying Transfer entered on April 14, 1978, to include a finding that the same Order involves a controlling question of law. This Court, being of the opinion that the amendment should not be granted, and the Court being of the opinion that a controlling question of law is not involved to which there is a substantial ground for difference of opinion, and that an immediate appeal from the Order may not materially advance the ultimate termination of the litigation, it is therefore,

ORDERED that Defendant's Motion To Amend the Order of April 14, 1978, is in all things Denied.

SIGNED AND RENDERED this the 2nd day of May, 1978.

/s/ JOE J. FISHER
Joe J. Fisher
United States District Judge

In The
UNITED STATES COURT OF APPEALS
for the Fifth Circuit

NO. 78-2105

In Re:

COOPER TIRE AND RUBBER COMPANY,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas.

Before BROWN, Chief Judge, COLEMAN and VANCE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

In The
UNITED STATES COURT OF APPEALS
for the Fifth Circuit

NO. 78-2105

In Re:

COOPER TIRE AND RUBBER CO.

Petitioner.

Petition for Writ of Mandamus
to the United States District Court
for the Eastern District of Texas

Before BROWN, Chief Judge, COLEMAN and VANCE, Circuit Judges.

Per Curiam:

On prior consideration of this petition for mandamus we disagreed with the district court's denial of petitioner's motion to transfer but such action did not appear to be such an abuse of discretion as would justify mandamus.

On consideration of the petition for rehearing, however, we conclude that we cannot allow the order of the district court to stand. The accident which is the basis of this law suit occurred in the Northern District of Texas. The plaintiff lived in the Northern District of Texas. The hospital where plaintiff was treated and all attending physicians were in the Northern District of Texas. The vendors of the allegedly defective tire were in the Northern

District of Texas. Every person, thing and event involved in the accident and injury of plaintiff was in the Northern District of Texas.

It is true that defendant is subject to suit in the Eastern District of Texas, that plaintiff's choice of forum is entitled to great weight and that some of the experts engaged by plaintiff's counsel since suit was filed are in the Eastern District of Texas. Having said that, however, we have said very little in the context of this total situation.

Our reconsideration of the issue brings us to the conclusion that the interests of justice compel a transfer in this case. We otherwise work a very obvious and unnecessary hardship on defendant and at least impliedly put a stamp of approval on a rather blatant example of forum shopping. This is precisely the type of situation Congress sought to avoid by adoption of 28 U.S.C. §1404 (a). Accordingly, we instruct the district court to grant defendant's motion for transfer.

WRIT GRANTED.

NO. 78-2105

In Re:

COOPER TIRE AND RUBBER COMPANY

COLEMAN, Circuit Judge, dissenting

I respectfully dissent.

I think that Cooper Tire is the forum shopper in this case. It is a Delaware Corporation. Admittedly, it is subject to suit in the Eastern District of Texas. The allegedly defective tire was not made in Texas. The first and second sellers of the tire live in Texas but they are not parties to the suit. They did not manufacture the tire. The doctors, under the rule of privilege, cannot be expected to appear as witnesses for Cooper. It is not shown that a jury inspection of the scene of the accident would have any relevancy.

In Gulf Oil Corporation v. Gilbert, 330 U.S. 501, 67 S. Ct. 839, 91 L.Ed. 1051 (1947), a *forums non conveniens* case, the Supreme Court pointed out that "unless the balance is strongly in favor of the defendant, the plaintiffs choice of forum shall rarely be disturbed".

28 U.S.C., §1404 is written in purely discretionary terms. The statute says that "a district court *may* transfer" (emphasis added). As all the cases recognize, a failure to transfer may be overturned only for an abuse of judicial discretion.

We are not told how many witnesses Cooper has in the

Northern District of Texas. I doubt that it has any, for the tire was not manufactured there. In any event, if the plaintiff wishes to shoulder the burden of getting its witnesses to court in Marshall, Texas, I fail to see how that this should be any concern of Cooper's — or of this Court, for that matter. It certainly is not a matter upon which we, in the exercise of the extraordinary writ of mandamus, should sally forth proclaiming "abuse of judicial discretion".

I see nothing in this case to indicate that if Cooper had been sued in Wilmington, Delaware, it would have been sued in Wilmington, Delaware, it would have been clamoring for a change of venue to the Northern District of Texas. It simply does not want to stand trial in the Eastern District of Texas, and, by order of this Court, its forum shopping has been vindicated. If it had been left to me the Company would stand trial where it was sued.